No. 10998

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND SOCIAL SECURITY BOARD, APPELLANTS

v.

AUGUSTA J. LALONE, ON BEHALF OF JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE, AND LANCE D. LALONE, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR APPELLANTS

EDWARD M. CONNELLY,
United States Attorney,

ARNOLD LEVY,
Special Assistant to the Attorney General,

HUBERT H. MARGOLIES,
Attorney, Department of Justice,
Attorneys for Appellants.

FILED
JUL 1 1 1945
PAUL P. O'BRIEN,
CLERK

INDEX

AUTHORITIES CITED

653438—45

PRELIMINARY STATEMENT

This reply brief is submitted, pursuant to stipulation herein, primarily for the purpose of repelling the attacks on appellants' statement of the case and renewed attacks on the referee's findings. For a more complete statement of the facts, reference is made to appellants' main brief and the referee's decision herein (Tr. 8–13).

THE FACTS

It is plain from the record that LaLone possessed a valuable asset in his insurance business and that the Barretts were actuated by business motives rather than sentiment in associating themselves with him. Even the testimony of Mrs. LaLone (Tr. 27, 32) does not bear out appellees' statement that final demands from the insurance companies had been received and that LaLone's condition was desperate. In fact, his valuable insurance business was quite attractive to the Barretts, who entered into an arms-length mutual benefit agreement with anticipation. At least the referee might have so found. The record is without support for the court's assertion (R. 29), quoted at page 9 of appellees' brief, that what LaLone had in 1938 was worthless, or appellees' assertion that LaLone's agency was on the precipice. Moreover, at the inception of the venture in 1938, according to Barrett, Jr.'s, testimony, it was considered that LaLone's insurance accounts were worth $3,600. He testified that F. S. Barrett & Co., by lending $2,148 (the actual amount was $2,039.63) to La-

Lone, put into the Barrett-LaLone Insurance Agency only a "little" more than the $1800 for which F. S. Barrett & Co., under the terms of the agreement, could buy a one-half interest in the Barrett-LaLone Insurance Agency after repayment of the notes, and that he, Barrett, therefore felt that their interest was "a little over half way" (Tr. 57–58). In May 1942, LaLone sold his insurance business to a third party for $5,000, paid off the notes, and dissolved the Barrett-LaLone Insurance Agency (Tr. 31–32, 47–48, 58, 129). Appellees are unable to reconcile the sale of his business in 1942 for $5,000 with its worthlessness in 1938. In view of the absence of any evidence to show a change in value and the failure to show profits between 1938 and 1942 (Tr. 49), if the insurance accounts were worth $5,000 in 1942, they were worth at least $3,600 in August 1938. Indeed, appellees' counsel stated at the hearing before the referee, and Barrett, Jr., agreed with him (Tr. 54), that the venture never proved as successful as the parties had hoped.

Appellees fail to explain the rental charged the Barrett-LaLone Insurance Agency by the Barrett Co. (Tr. 45, 51) and the maintenance of separate accounts (See Tr. 48 Barrett, Jr.—"We kept our records entirely separate with the idea that we could split if the agreement didn't prove out to be all right, and we pooled the money into one account and handled it all under the Barrett-LaLone Agency account."). And Mrs. LaLone testified (Tr. 27)—"I don't know whether they ever came to an agreement or not. But he was to manage Mr. Barrett's insurance agency in connection with his own."

The failure to file social security tax returns until 1942, as well as the fact that money was never borrowed for the "benefit of the insurance company" without LaLone's signature (Tr. 52) also require explanation if the theory of an employment status with F. S. Barrett & Co. is to be accepted.

At page 5 and elsewhere in appellees' brief much is made of the evidence that in January, 1942, LaLone registered as an employee with the Social Security Board and received a Social Security Account Number, and that at the same time Miss Ebeling also registered and received her Account Number, and that thereafter "returns were duly filed under the Act showing both employees and the wages paid them," etc. Attention might have been drawn to Lalone's contemporaneous insistence that coverage under the Social Security Act, was not sought on the basis that he and Miss Ebeling were employees of the corporation, F. S. Barrett & Co., which had its own Employer's Identification Number distinct from that obtained by Barrett-LaLone Insurance Agency (Tr. 124), but on the contrary, on the basis they were employees of the latter. And it might well have been added that those returns (filed only for the first quarter of 1942, and for the second quarter up to May 15, 1942), alleged that LaLone and Miss Ebeling were employees of *Barrett-LaLone Insurance, not of F. S. Barrett & Co.* (Tr. 125–129). Likewise, it is highly selective to omit to mention that *LaLone,* in obtaining for Barrett-LaLone Insurance Agency a separate Employer's Identification Number, expressly informed the Bureau of Internal Revenue that *he and F. S. Barrett & Co. were co-owners of the Barrett-*

LaLone Insurance Agency (Tr. 124), and subsequently filed (attached to the tax return for the second quarter up to May 15, 1942), a *notice of dissolution of the partnership of the Barrett-LaLone Insurance Agency* (Tr. 129). Appellees neglect to refer to the highly significant testimony that the Social Security taxes in connection with the only two returns that were filed, were "paid out of the Barrett-LaLone Insurance Agency, not Barrett and Company" (Barrett, Sr., at Tr. 70). F. S. Barrett & Co. never reported either LaLone or Miss Ebeling as its employee. Even after the death of LaLone and the filing of the application for benefits, a statement was made out on January 14, 1943, in the course of the usual administrative inquiry, on Social Security Board Form OAC–1001, signed "Barrett-LaLone Ins. Agency, by F. S. Barrett," purporting to show wages paid LaLone *not by F. S. Barrett & Co., but by Barrett-LaLone Insurance Agency* as the alleged employer (Tr. 93, 95, 99). It becomes obvious that both the Barretts and LaLone, in their belated efforts to obtain coverage, were proceeding upon the legally untenable theory that a working member of a partnership or joint adventure, drawing a so-called "salary," is not only a partner or joint adventurer, but may also simultaneously be an employee of the partnership or joint adventure—in this case, the Barrett-LaLone Insurance Agency. See cases cited at page 22 of Appellants' brief, *e. g., Auten* v. *Michigan Unemployment Compensation Commission,* 17 N. W. (2d) 249, (1945), in which the Supreme Court of Michigan held, in accordance with the general rule, that "a working partner, receiving a stated salary," is

not an "employee." See also *Ellis* v. *Joseph Ellis & Co.*, (1905) 1 K. B. 324; "Working Partners," by Joel Brown, Chairman, Idaho Industrial Accident Board, Bulletin No. 432, Bureau of Labor Statistics, United States Department of Labor, 1926, pages 190–195.

The appellees' rhetorical questions (Brief, pp. 12–13), "Why were all funds deposited to the account of Barrett-LaLone Insurance Agency? Why were all notes signed by one of the Barretts and LaLone? Why were all checks signed by one of the Barretts and LaLone?", ignore the essentials of the situation. It was not merely that *LaLone's* powers were circumscribed. By the same token the Barretts could not sign checks on the Agency funds without the cosignature of LaLone (Tr. 40–42), nor sign notes of the Agency without the cosignature of LaLone (Tr. 51–52). It would be strange, indeed, for the signature of a mere employee to be requisite to the effectiveness of a check or note signed by the supposed sole owner of the business. Clearly, the requirement of countersignature by the representative of one member of the venture, the corporation, and by the other, LaLone, was important evidence of joint control and ownership.

At pages 10–11 of appellees' brief, the finding of the court below that, "LaLone had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debt and discharged him" (R. 32) is adopted. LaLone put at the hazard of the business not only his accounts but also his personal liability on the notes to the bank, not to mention his liability on the notes to F. S. Barrett & Co., Inc. The

appellees, like the lower court, rely upon a statement in the Questionnaire to the effect that there was no provision for sharing of loss and that F. S. Barrett & Co. would have been responsible for losses. However, the statement is disproved by the evidence before the referee. In the first place, there are the promissory notes totalling $2,039.63, which LaLone executed to F. S. Barrett & Co. He would have remained liable if he had not discharged them. Then, too, there is the testimony regarding notes given for bank loans obtained by Barrett-LaLone Insurance Agency, which LaLone was required to sign along with one of the Barretts. Those notes were later repaid to the bank out of the subsequent profits of the agency (Tr. 51–52), but LaLone, as well as Barrett, would have been liable if losses had been suffered. Indeed, under the provisions in the unsigned agreement, which Barrett testified "clearly reflects the relationship that was intended" by Barrett and LaLone (Tr. 39), it was contemplated that LaLone would share in losses as well as in profits. Finally, as pointed out in footnote 19 at page 29 of appellants' brief, the absence of an express agreement to share losses is not inconsistent with a joint venture.

For the rest, appellees have misconceived the scope of judicial review and consequently have been persuaded (pp. 7–8 of their brief) that

> Appellants apparently admit that the administrative determination in this matter was erroneous, for on page 14 of their brief they say, "Was the administrative determination on the undisputed facts that LaLone was self-employed

> and not in the employ of another so *erroneous* as to permit the District Court to say that as a matter of law it was not supported by substantial evidence."

Nothing could be further from appellants' intention nor wider of the mark. The language is conventionally used in the cases (see, *e. g.,* in addition to the cases cited in Point III of appellants' main brief, *Gardner* v. *Railroad Retirement Board,* 148 F. (2d) 935, 937 (C. C. A. 5)) to signify that in the "intermediate" cases (*National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 124, 126) there *is* an "in between" zone where the Board's determination, reasonably reached, is conclusive. *Cf. Merrill* v. *Fahs,* 324 U. S. 308, 310. Our formulation of the question, when read in context, intended to refer (1) to the high degree of conclusiveness accorded to the administrative determination, and (2) to the limited scope of judicial review. Far from admitting, even *arguendo,* that the administrative determination in this case was erroneous in any sense our position in the brief was clear. "By the standard of substantial support in the evidence, the Board's finding must be upheld. *Actually it is supported by the great preponderance of the evidence"* (p. 16; see also pages 30, 39).

What appellees have attempted to do in their counter-statement and argument is precisely what not even the courts, in reviewing administrative determinations, have the power to do, to "pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission." *Federal Trade Commission* v. *Educational Society,* 302 U. S. 112, 117.

Repeated assertions in appellees' brief, such as those at page 4, that "LaLone went to work for the Barretts for $200 a month," that "LaLone's compensation of $200 a month continued from August, 1938, to May 1, 1942," and similar statements elsewhere in appellees' brief, are unaccompanied by the disclosure that the $200 was payable only from net profits of the Barrett-LaLone Insurance Agency.

Inasmuch as appellees' brief (pp. 12–13) has quoted from and referred to some of Barrett, Sr.'s, answers in the Partnership Questionnaire, it should be emphasized that Barrett filled out the questionnaire in connection with the *ex parte,* routine investigation of appellees' application for benefits by the Bureau of Old-Age and Survivors Insurance of the Social Security Board. Later, after the Bureau had disallowed the claim and appellees obtained a hearing before a referee, the Barretts appeared as witnesses for appellees and gave more complete testimony. The referee and the Appeals Council obviously had discretion to give greater credence to the testimony (and other evidence) at the hearing. For example, the same Barrett who had signed the Questionnaire, including statements therein purporting to show that LaLone was paid a "salary" of $200 a month, testified at the hearing that "He [LaLone] was to receive $200 a month *out of the net profit*" (*Tr.* 74). This is in accordance with what the unsigned agreement provides (Tr. 117), and what was actually done in practice.

The information contained in the questionnaire is inconclusive. Taken as a whole, it is at least as favorable to the inference that LaLone retained a propri-

etary interest in his insurance business and was co-owner of the Barrett-LaLone Insurance Agency, from whose funds his so-called "salary" was paid, as to the inference that he was an employee. The excerpt quoted from the questionnaire at page 12 of appellees' brief, clearly shows that F. S. Barrett & Co. did not purchase LaLone's business. On the contrary, it states that said Company made him a *loan* on his business *as security,*[1] and admits that, "A bank account was opened up as Barrett-LaLone Insurance Agency, otherwise the business was maintained under two separate heads, notes were paid and he moved out May 1, 1942." This disproves the contention that F. S. Barrett & Co. purchased LaLone's insurance business and that he merely had the right to buy it. Significantly, question 14 (Tr. 102), as to whether income tax returns

[1] The statements at page 6 of appellees' brief that if the arrangement between the parties "didn't prove satisfactory on either part, LaLone could pay the Barretts back their money and take his business," and that "LaLone had the right to buy back his business," imply that F. S. Barrett & Co. purchased LaLone's business. Actually F. S. Barrett & Co. merely made a loan and all that the Barretts claimed was that his business was *security* for the repayment of the loan. See also Barrett, Jr.'s, testimony: "Well, I think we had advanced him certain moneys as a mortgage on his business" (Tr. 55).

By selling his business in 1942 without previous consultation with the Barretts, LaLone convincingly evinced his own understanding of the interest he retained. He did not proceed on the assumption that in 1938 he had no alternative but to sell his business to F. S. Barrett & Co. and become its employee. His action is consistent only with the view that he had solved his problem by obtaining a loan and pooling the insurance businesses under his management. In forming a joint venture it is not unusual for the coadventurers to retain title to specific assets but to pool their use and share profits in agreed proportions. The Barretts never questioned his power or right to dispose of his proprietary interest.

were made on a partnership basis, was left unanswered in the questionnaire. But at the hearing it was disclosed that F. S. Barrett & Co. returned only one-half of the Barrett-LaLone Insurance Agency profit as income (Tr. 71–74).

The contention at page 4 of appellees' brief that the Barretts had ultimate control of the insurance department finds its answer in the evidence, which shows *consultation among* the Barretts and LaLone on questions of policy, *not* control or direction by the Barretts over LaLone. (Appellants' brief, pages 33–34.)

The statements at page 12 of appellees' brief to the effect that, "F. S. Barrett filed Statement of Employer," purporting to show payment of wages to LaLone and that, "These were all signed by Mr. Barrett, Sr., January 15, 1943," neglect to mention that these Statements (Tr. 93, 95, 99) were *not* signed by Barrett, Sr., as President of F. S. Barrett & Co., but in behalf of *Barrett-LaLone Insurance Agency,* and that Barrett-LaLone Insurance Agency is the only name given LaLone's alleged employer. They inadvertently convey the impression that the Statements (not filed until the processing of appellees' application for benefits), purport to show payment of wages by F. S. Barrett & Co. *In fact they show payment by Barrett-LaLone Insurance Agency,* and carry the latter's Identification Number. The "Statement of Employer" is the capstone in the proof that the Barretts did not consider LaLone an employee of F. S. Barrett & Co.

It is plainly an overstatement to say that the record "bulges" with proof that LaLone was an employee. The overwhelming weight of the evidence shows that

LaLone retained his proprietary interest in his insurance business during the period of combined or "pooled" operation of his insurance business and the much smaller insurance business of F. S. Barrett & Co. The Barretts and LaLone considered that he was co-owner of the Barrett-LaLone Insurance Agency. Such evidence as refers to him as an employee, does not do so on the theory that he was an employee of F. S. Barrett & Co., but rather on the theory that his so-called "salary" from the profits of the Barrett-LaLone Insurance Agency could qualify him as having the status of an employee of Barrett-LaLone Insurance Agency under the Social Security Act, notwithstanding his proprietary interest.

A trace of editorial slant is perhaps inevitable in any concise statement of the case. It is respectfully submitted that the referee's decision is unusually free of this failing.

CONCLUSION

The judgment appealed from should be reversed and the decision of the Social Security Board reinstated.

Respectfully submitted.

EDWARD M. CONNELLY,
United States Attorney,
ARNOLD LEVY,
Special Assistant to the Attorney General,
HUBERT H. MARGOLIES,
Attorney, Department of Justice,
Attorneys for Appellants.

U. S. GOVERNMENT PRINTING OFFICE: 1945